

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1092

ORIGINAL
United States Court of Appeals
For the Second Circuit

OVERSEAS AFRICAN CONSTRUCTION CORPORATION, Employer,
and ST. PAUL MERCURY INSURANCE COMPANY, Carrier,
Plaintiffs-Appellants-Appellees,
against

EUGENE McMULLEN, Dec'd, by GEORGE McMULLEN, Execu-
tor, and JOHN D. McLELLAN, JR., Deputy Commissioner,
United States Employees' Compensation Commission, Sec-
ond Compensation District,
Defendants-Appellees-Appellants.

**APPENDIX FOR
PLAINTIFFS-APPELLANTS-APPELLEES**



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(continued on inside cover)

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PAGINATION AS IN ORIGINAL COPY

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Docket Entries

- 7-21-72 Filed Complaint & Issued 20 & 60 day Summons.
- 9- 3-72 Filed Summons and Marshal's return—Served John D. McLellan Jr. Deputy Commissioner—US Employees' Compensation by mailing a copy by certified mail to the Attorney-Gen., Washington D.C. on 8-2-72 Served—George McMullen on 7-27-72.
- 9-29-72 Filed stip & order that time to answer plttf's complaint is ext. to 9-30-72—So ordered. Brieant, J.
- 9-29-72 Filed deft's Answer to complaint (McMullen).
- 10-10-72 Filed Answer of deft. John D. McLellan, Jr. to complaint.
- 10- 9-73 Filed deft's (Eugene McMullen) notice of motion for summary judgment—ret. 10-17-73.
- 10- 9-73 Filed deft's (McMullen) statement of facts.
- 10-16-73 Filed affdvt. of Terence Gargan in support of motion by deft. George McMullen for summary judgment.
- 10-16-73 Filed stip. & order adjourning motion to 10-30-73 —Brieant, J.
- 10-16-73 Filed memorandum of law in support of the McMullen motion for summary judgment.
- 11-21-73 Filed memorandum & order-granting defts' motion for summary judgment—The Clerk shall enter judgment in favor of George McMullen as Executor of the last will and testament of Eugene McMullen, deceased, and against St. Paul Mercury Ins. Co. in the Amount of \$14,994.60, and costs—So ordered—Brieant, J.-m.n.
- 11-27-73 Filed Judgment #73,929—that deft. George McMullen as Executor, have judgment against the

Docket Entries

plttf. St. Paul Mercury Ins. Co. in the amount of \$14,994.60, with costs to be taxed—Judgment entered—Clerk-mailed notice ent. 11-27-73.

- 12- 3-73 Filed memo attached to letter dated 11-30-73—Treating the letter as a motion to reargue the memorandum decision dated 11-21-73—the reargument is granted. On such reargument, the prior determination of the Court is adhered to, and in addition, the Court fixes the reasonable value of the legal services rendered to the Estate of Eugene McMullen, deceased, in this action at the sum of \$1800. which shall be a lien on the judgment recovered—So ordered—Brieant, J.
- 12-14-73 Filed Bill of costs on Judgment #73,929—as taxed in the sum of \$20. and added to the judgment.
- 12-20-73 Filed plaintiffs' Notice of Appeal from judgment of November 21. m/n.
- 12-20-73 Filed Notice of Appeal of deft. Eugene McMullen from judgment of November 21. m/n.
- 12-27-73 Filed Statement Under Rule 9(g) in opposition to deft's motion for summary judgment.
- 12-27-73 Filed Memo of Law of Plaintiff's Overseas African Const. Corp., employer, in opposition to motion for summary judgment.

A true copy

RAYMOND F. BURGHARDT, Clerk

By Warner Freeman
Deputy Clerk

Complaint**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

The plaintiffs, by their attorneys, Jacowitz & Silverman, P.C., allege as follows:

1. This action is brought under and pursuant to the provisions of Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC section 921 and section 1651 of the Defense Base Act (42 USC section 1651, et seq.), to set aside a Compensation order based on an injury which occurred in a Foreign Compensation District, and the proceedings having been had before the Deputy Commissioner of the Second Compensation District, as hereinafter more fully appears.

2. At all the times hereinafter mentioned, John D. McLellan, Jr., was and now is a duly appointed Deputy Commissioner for the Second Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Base Act.

3. In August, 1968, plaintiff, a construction corporation, incorporated under the laws of the State of Delaware agreed to construct and was in the process of constructing

Complaint

a Water intake, treatment plant and water supply and distribution system in Chisimaio, Somali, Africa.

4. In August, 1968, the defendant, Eugene McMullen, was employed by the plaintiffs, Overseas African Construction Corporation, as chief accountant and alleged to have sustained injuries as a result of said employment.

5. The project heretofore mentioned in Chisimaio, Somali, was totally financed on a development loan basis. As evidenced by a letter to the Deputy Commissioner from the Deputy Assistant General Counsel for Africa of the Agency for International Development for the Department of State of the United States, dated February 22, 1972, and marked Carrier's Exhibit "B" and introduced into the record, and as such the enforcement of any relief sought by the defendant Eugene McMullen, is not within the jurisdiction of the Deputy Commissioner.

6. On July 6, 1970, the defendant, Eugene McMullen forwarded a letter to the office of the Deputy Commissioner purporting to set forth a claim under the Defense Base Act, which was filed after the time for said filing as set forth by statute and was improper.

7. Thereafter, Eugene McMullen, died before the determination of this claim and no evidence of a proper party to receive the award has been introduced.

8. Thereafter, and on or about June 22, 1972, and after hearing, the defendant, John D. McLellan, Jr., purporting

Complaint

to act under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Defense Base Act, as amended (42 USC 1651) made an award and signed and entered an order, a copy of which is annexed hereto as exhibit "A", allowing the aforementioned claim of Eugene McMullen, and directing the payment of Compensation to the Executor of his purported Estate.

9. Such award and order are not in accordance with law but contrary thereto and to the facts and against the evidence in that at the time Eugene McMullen, alleged to have sustained an injury, the Construction Contract and obligations thereunder which his employer, Overseas Africar Construction Corporation, performed was a contract pursuant to a Development Loan from the Agency for International Development and hence there is no mandatory coverage under the act and the Deputy Commissioner is devoid of jurisdiction; and there is no jurisdiction since the claim was not filed within the time required by law; and there is no medical evidence to substantiate the claim for benefits; and there is no evidence of a proper party to receive the award.

WHEREFORE, plaintiffs pray that an injunction be granted restraining defendant from enforcing such order dated June 22, 1972, and directing that such award and order be vacated and that the compensation claim heretofore filed by Eugene McMullen be dismissed or alternatively, that the award and order be rescinded and the matter remitted to the Deputy Commissioner to take the testimony of the


6a

Complaint

officials of the Agency for International Development as to the nature of the project heretofore discussed, and for such other and further relief as may be just together with the costs of this proceeding.

Irwin B. Silverman
For the firm:
Jacowitz & Silverman, P.C.
Attorneys for Plaintiffs,
Office & P.O. Address
44 Court Street
Brooklyn, N.Y. 11201

Exhibit A Annexed to Complaint
Compensation Order

(See Opposite )

UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

Foreign Compensation District

.....
In the matter of the claim for compensation
under the Longshoremen's and Harbor Workers'
Compensation Act as extended by the Defense
Base Act, as amended (42 USC 1651).

EVYON HAWLEY,

Claimant-Employee, vs.

OVERSEAS AFRICAN CONSTRUCTION COMPANY,
Employer.

ST. PAUL MERCURY INSURANCE COMPANY,
Insurance Carrier
.....

COMPENSATION ORDER

AMOUNT OF COMPENSATION
CASE NO.
HS P-2-18791

U.S. F.I.C. 4
NEW YORK
JUL 19 1964
U.S. DEPT. OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPT. OF JUSTICE
U.S. DEPT. OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPT. OF JUSTICE

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

(1) That the employee herein was in the employ of the employer herein from May 1960 through December 1960, at Chinimo, Somalia, Africa, which is located in the Foreign Compensation District, established pursuant to the provisions of the Defense Base Act (42 USC 1651, et seq.), which is an extension of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 901, et seq.) that said employment was pursuant to a contract to be performed outside the Continental United States, as defined in Section 1(a) of the Defense Base Act (HRA) [42 USC 1651(a)] and that the liability of the employer for compensation under said Act was insured by the St. Paul Mercury Insurance Company;

(2) That the employee was hired by the employer herein by contract of employment dated May 14, 1968 for employment in Chinmiao as Project Manager and Chief Accountant of a project to be carried out by the employer herein; that the project consisted of constructing a settling tank for water (drawn out of a nearby river) and laying a pipe from the tank to the town of Chinmiao; that the project also required the construction of additions to the existing port facilities at Popudi Island, near Chinmiao;

(3) That the entire project was supervised by the U.S. Corps of Engineers, which organization approved for acceptance the various parts of this construction contract as they were completed; that upon approval and acceptance on the part of the Corps of Engineers in regard to completed segments of the construction required by the contract, funds for payment of the completed parts would be provided the contractor (the employer herein) by A.I.D. (Agency for International Development, U. S. Department of State);

(4) That the employer (contractor) saw this construction contract as a "public works" contract involving harbor improvements, with payments being made by A.I.D. and therefore a contract wherein the employee would be covered for workman's compensation by the Defense Base Act; that the employer therefore obtained an insurance policy (D-389) from the carrier herein, to secure the employer's liability under the Defense Base Act as required by that law; that the carrier now seeks to negate its liability under the Defense Base Act and the policy issued, by alleging that the DBA does not apply to the above construction contract and employment;

(5) That the evidence received, clearly shows that the employment under the contract comes within the jurisdiction of the Defense Base Act; that the carrier, in an attempt to establish lack of DBA jurisdiction, introduced into evidence, after the hearing, a letter from A.I.D. dated February 22, 1972, but submitted no testimony or

direct evidence at the hearing which would tend to support a finding of no jurisdiction; that the letter from AID is insufficient by itself to overcome the statutory presumption of jurisdiction;

(6) That there is lack of substantial evidence to overcome the presumption that his claim comes within the provision of the Defense Base Act; that the DBA does app. v to this contract and the employment thereunder, as described herein;

(7) That the policy, #C-3089, can reasonably be held to apply to the employment of the claimant under the contract described herein and that policy provides the Defense Base Act insurance coverage required of the contractor-employer herein; that the term "A.I.B. Project" in the policy could reasonably be a name for the DBA construction contract described herein, since payments for the work were made through and by A.I.B.;

(8) That the employee's duties as Project Manager of the construction project described herein, required him to be responsible for the entire project, including the preparation of accounting reports, supervision of the accounting office, camp management, security guards and Post Exchange warehouse, the checking of the preparation of the reimbursement requests, etc.; that these duties required him to work approximately 15 hours a day, 6 days a week, with 8 hours' work on the 7th day; that such duties were performed in hot, humid climate, where the temperatures would reach 100° during the day; that his duties required him to travel around the project each day; that about two to three hours were spent in his air-conditioned office and other time spent in warehouses and in other areas where there is no air-conditioning; that the warehouses had corrugated tin roofs and

the interiors were very hot; that the claimant felt severe tension on his job because of the responsibility he had for taking and keeping all inventory of equipment on the job and he "was afraid to turn(his)back because it (equipment) was getting stolen or lost"; that he had to account for stolen merchandise;

(9) That he began his duties in Somalia, as above described, in May 1968; that in August 1968 he noticed a rash on his hands and feet; that he was treated initially by the company doctor and then was advised by that physician to go to the General Hospital at Nairobi, Kenya, for further treatment; that the employee was hospitalized for treatment of the rash diagnosed as neurodermatitis; that the treating physician at the hospital advised the employee that neurodermatitis was due to the climatic conditions where he worked and extreme tension; that after 11 days in the hospital, the employee signed himself out and returned to the job site after being advised that his office accountant on the project had quit;

(10) That on returning to the job site, he continued performing his duties, despite the rash; that in December 1968 the skin condition became much worse and he then returned to the Nairobi General Hospital for 14 days of in-patient treatment; that following such, he returned to his job, worked several days, after which the skin condition erupted all over his body and he was advised by the treating physician to return to the United States; that while traveling on a commercial plane to the United States, he was requested by the plane's captain to get off in Rome because the skin condition was giving off an offensive odor; that after two days of treatment in Rome, he continued his trip home in another plane;

(11) That since August 1968 the skin condition did not clear up and was still evident and apparent at the time of the hearing in this matter, especially on the employee's hands, feet and back of his arms; that the employer paid the employee his full wages through December 31, 1968; that the employee has not worked

and has received no wages since that date; that the skin condition diagnosed as neurodermatitis has prevented the employee from obtaining employment;

(12) That it would appear reasonable to conclude that the long hours that the claimant worked in the hot, humid climate, together with the responsibilities and tensions of the employment at the job site, caused, aggravated or precipitated the skin condition complained of, and the Deputy Commissioner so finds; that there is no evidence to the contrary; that the skin condition, neurodermatitis, arose out of and in the course of the employment above described, and constitutes an injury within the meaning of the Act, and the injury and the subsequent disability is covered by that Act;

(13) That written notice of the injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice;

(14) That the employer at the hearing alleged that the employee's claim for compensation was not timely filed; that the employee first notified the Office of the Deputy Commissioner of his claim under the Defense Base Act by his letter received in the office of the Deputy Commissioner on July 6, 1970; that that letter was sufficient to constitute a claim under the Act; that the Employer's First Report of Accident or Occupational Illness covering this injury was received in the Office of the Deputy Commissioner on December 22, 1970; that the claimant's claim for compensation was timely filed [33 U.S.C. 930(f), 919];

(15) That the employee had an average weekly wage of \$311.50 at the time of injury;

(16) That as a result of the employment-related neurodermatitis, the employee was temporarily totally disabled within the meaning of the Act, from January 1, 1967 to the date of the hearing (January 25, 1972) and continuing; that

the employee's attorney notified the Deputy Commissioner subsequent to the hearing that the employee died January 30, 1972; that, therefore, compensation is to be paid for 160-5/7 weeks at the maximum weekly rate of \$70.00 is the amount of \$11,250.00 covering the period of total disability from January 1, 1969 to January 30, 1972, incl.;

(17) That up until the end of 1968, the employer provided treatment in accordance with Section 7(a) of the Act; however, since December 31, 1968 the employer has provided no treatment for the employment-related condition; that the employee obtained, on his own, medical care, the cost of which he estimated at \$3,000.00; that at the hearing the claimant presented medical bills in the amount of \$1,245.50; representing payments he made for treatment for the related conditions; that the employer and carrier are to reimburse the claimant's estate in the amount of the documented medical payments of \$1,245.50, which amount is reasonable;

(18) That in 1966 the employee was engaged in similar employment in Vietnam with another employer (Walter Kiddie Constructors, Inc.) where he also contracted a skin rash causing a period of disability for which he received compensation under the Defense Base Act (Deputy Commissioner's administrative file #15-0944); that such skin condition had cleared up before he was hired for the employment with the employer herein in 1968; that on his pre-employment physical examination for the employment herein, it was discovered that he had a liver condition and heart condition; that no skin condition was found; that the employee had, for the past 25 to 30 years a cardiac impairment, which condition caused him to be hospitalized 5 days at the end of 1969 and 9 days in August 1971; that prior to his employment with the employer herein, and as a condition for such employment, the employee had to agree to waive any possible action against the employer herein as a result of such pre-existing conditions; that there is no similar reference to any pre-existing skin condition of the employee; that the skin condition which was reported in 1966 with the previous employer had completely resolved prior to his employment with the employer herein,

which employment began in 1968;

(19) That on August 21, 1969, the claimant settled a separate sickness policy, #CS 1018, with AFIA-St. Paul Mercury Insurance Company, for \$150.00 a week for 13 weeks, in the amount of \$1,800.00; that the release signed in regard to the settlement under the terms of that sickness policy, did not act to release or negate any claim the claimant had under the EBA (or under policy #0-3989); that by signing that release, the claimant did not waive any rights he had in regard to the claim made under the Refunds Due Act.

Upon the foregoing Findings of Fact, the Deputy Commissioner makes the following

AWARD

That the employer, Overseas African Construction Corp., and the insurance carrier, St. Paul Mercury Insurance Company, shall pay compensation as follows: 160-5/7 weeks from January 1, 1969 to January 30, 1972, incl., at \$70.00 per week in the amount of \$11,250.00 for temporary total disability, all of which has accrued. The employer and carrier having paid nothing of this amount as compensation, there is due and payable, \$11,250.00, which amount the employer and carrier are **DETERMINED** to pay forthwith, in one sum, less attorney fees hereinafter provided.

The employer and carrier are also **DETERMINED** to pay as reimbursement, the amount of \$1,215.50 for documented medical expenses incurred by the claimant.

The payment under this Award, less the attorney's fee, shall be made to the Estate of Eugene McMillan, c/o George McMillan, Executive, 7201 - 4th Avenue, Brooklyn, New York 11209.

A fee in the amount of \$2,500.00 is approved in favor of Israel, Adler, Fonen & Cassiardo, Esqs., 160 Broadway, New York, N.Y. 10036, for services rendered the claimant in the presentation of his claim and made a lien on the compensation.

Given under my hand and filed at 1215 Broadway,
New York, N.Y. 10036, this 22nd day of June 1972.

John P. McEllen Jr.
Deputy Commissioner
Foreign Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was
sent by certified mail to the Estate of Eugene McMillen, his attorneys, the employer
and the insurance carrier, at the last known address of each, as follows:

Estate of Eugene McMillen, c/o George McMillen, Executor - 7201 4th Ave., Brooklyn, NY 11229
Errel, Adler, Rosen & Cucciarde, Esqs. - 160 Broadway, New York, N.Y. 10038
Overseas African Construction Corp., - 615 Madison Ave., New York, N.Y. 10022
St. Paul Mercury Insurance Co., c/o AFA Worldwide Insurance, 110 William Street,
New York, N.Y. 10038


John P. McEllen Jr.
Deputy Commissioner
Foreign Compensation District

Filed: June 22, 1972
Carrier's No. 7

7a

8a

Exhibit B Annexed to Complaint
Letter from Department of State,
Agency for International Development

(See Opposite )

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20522

A. F. I. A.
FEB 24 1972
D. C. OFFICE
6AF-2-16791

Mr. John McClellan
Deputy Commissioner
Department of Labor
321 W. 44th Street
New York, New York 10036

Dear Mr. McClellan:

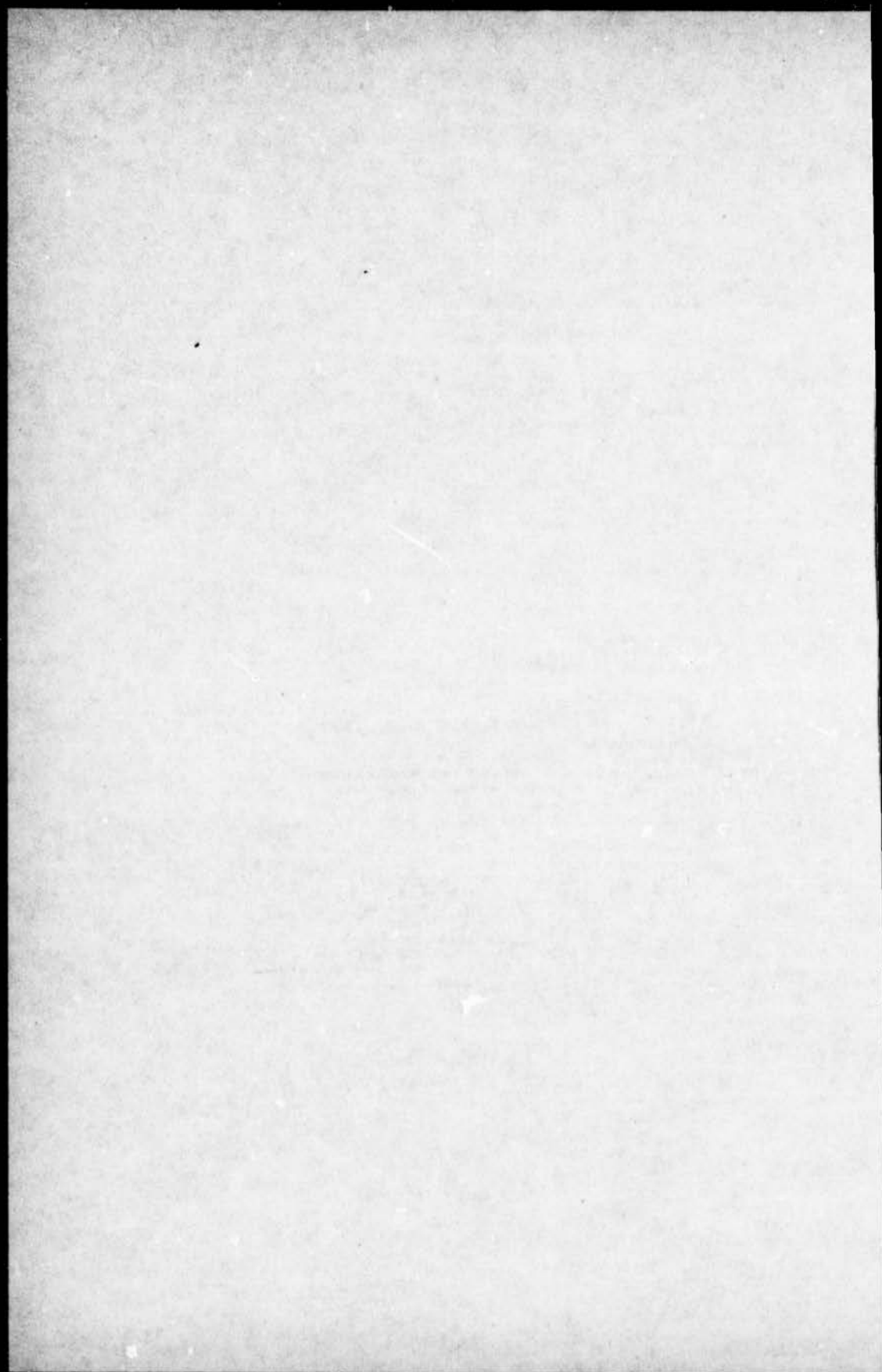
The following information is supplied in response to your inquiry to Mr. Barry Wallace concerning Overseas African Construction Corporation's work on the Chisinaio Port project. The work performed by Overseas African was totally financed on a development loan basis. The applicable loan is designated as Chisinaio Port and Municipal Facilities Loan No. 649-H-002.

If I can be of any further assistance to you in this matter do not hesitate to write.

Sincerely yours,

Gerald H. Zarr

Gerald H. Zarr
Deputy Assistant General Counsel
for Africa



9a

Answer of Defendant McMullen

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Defendant, Eugene McMullen, Dec'd, by George McMullen, Executor, answering the complaint herein, shows on information and belief as follows:

1. Admits the allegations of Paragraph One.
2. Admits the allegations of Paragraph Two.
3. Admits the allegations of Paragraph Three.
4. Admits the allegations of Paragraph Four.
5. Denies the allegations of Paragraph Five.
6. Denies the allegations of Paragraph Six except admits that on July 6, 1970, a claim was timely filed with the office of the Deputy Commissioner, setting forth a claim under the Defense Base Act.
7. Denies the allegations of Paragraph Seven except that Eugene McMullen died on January 30, 1972.
8. Admits the allegations of Paragraph Eight.
9. Denies the allegations of Paragraph Nine.

Answer of Defendant McMullen

*For a Complete Defense and Counter Claim,
Defendant Eugene McMullen, Dec'd,
by George McMullen, Alleges:*

10. The compensation order dated June 22, 1972 signed by defendant, John D. McLellan, Jr., Deputy Commissioner referred to in the complaint is in all respects in accordance with the Defense Base Act (42 USC 1651, et seq.) and the Longshoremen's & Harbor Worker's Compensation Act (33 USC 901 et seq.).

11. The defendant, Eugene McMullen, Dec'd, was employed by plaintiff, Overseas African Construction Corporation, as a manager and chief accountant to work at Chisimaio, Somalia, Africa.

12. The defendant, Eugene McMullen, Dec'd, developed a neurodermatitis which arose out of and in the course of employment, constituting an injury within the meaning of the Defense Base Act and the Longshoremen's & Harbor Worker's Compensation Act, and said defendant made a claim for compensation and medical benefits for said injury.

13. That a hearing was held before John D. McLellan, Jr., Deputy Commissioner, on January 25, 1972, for the purpose of making a determination as to the compensability of said claim.

14. That at said hearing, Plaintiffs, Overseas African Construction Corporation, and St. Paul Mercury Insurance Company, were represented by their own respective attorneys. The attorney for Overseas African Construction Corporation admitted that the work involved a "public works" contract with payments being made by A.I.D. and

Answer of Defendant McMullen

that employees would be covered for compensation benefits under the Defense Base Act.

15. That a policy of insurance was obtained by defendant, Overseas African Construction Corporation, through the defendant, St. Paul Mercury Insurance Company, bearing #C3989, covering such employment under the Defense Base Act.

16. That based on the evidence presented to the defendant, John L. McLellan, Jr., Deputy Commissioner, a Compensation Order and Award of Compensation in favor of the defendant, Eugene McMullen, Dec'd, was filed and mailed to the defendant on June 22, 1972.

17. That notwithstanding the admission set forth in the 14th paragraph above, the plaintiff, St. Paul Mercury Insurance Company, continues to controvert and litigate this claim by denying the employer's admissions by denying its policy of insurance under the Defense Base Act and by continuing to refuse to make payment of compensation as is required by Section 921 b of the Longshoremen's & Harbor Worker's Compensation Act without reasonable grounds in view of the admissions and concessions made by the employers attorneys, and is therefore liable under the Longshoremen's & Harbor Worker's Compensation Act (33 USC926) for the costs of these proceedings.

18. That the court is requested to make such a finding that this action is brought in violation of Section 926 of the Longshoremen's & Harbor Worker's Compensation Act, and assess costs in the amount of \$6,500.00.

Wherefore, the defendant, Eugene McMullen, Dec'd, by George McMullen, Executor, demands that the complaint

Answer of Defendant McMullen

of the plaintiffs herein be dismissed with costs and that the defendant, Eugene McMullen, Dec'd, by George McMullen, Executor, have a judgment entered against plaintiff, St. Paul Mercury Insurance Company for the sum of \$6,500.00 for his costs and attorneys fees.

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys for Defendant, Eugene
McMullen, Dec'd, by George McMullen,
Executor
Office & P.O. Address
160 Broadway
New York, New York 10038

By A. C. Gucciardo

ANGELO C. GUCCIARDO

Answer of Defendant McLellan, Jr.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, John D. McLellan, Jr., Deputy Commissioner, Office of Workmen's Compensation Programs, United States Department of Labor, for its answer to the plaintiff's complaint, shows upon information and belief, as follows:

1. Admits each and every allegation contained in Paragraph 1.
2. Admits each and every allegation contained in Paragraph 2.
3. Admits each and every allegation contained in Paragraph 3.
4. Admits each and every allegation contained in Paragraph 4.
5. Denies each and every allegation contained in Paragraph 5.
6. Admits the allegation in Paragraph 6 that Eugene McMullen mailed a letter which constituted a written claim under the Defense Base Act which was received by the Deputy Commissioner on July 6, 1970, but denies that said claim was not timely filed.

Answer of Defendant McLellan, Jr.

7. Admits the allegation in Paragraph 7 that Eugene McMullen died during the pendency of this claim but denies that there is no evidence of a proper party to receive the award.

8. Admits each and every allegation contained in Paragraph 9.

9. Denies each and every allegation contained in Paragraph 9.

*As for a First Affirmative and Complete Defense,
Defendant Alleges Upon Information and
Belief, as Follows:*

10. That the compensation order complained of is in all respects in accordance with law.

WHEREFORE, defendant Deputy Commissioner prays that the complaint be dismissed.

Dated: New York, New York
October 10, 1972

WHITNEY NORTH SEYMOUR, JR.
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
U.S. Department of Justice
Attorneys for Defendant
JOHN D. McLELLAN, JR.,
Deputy Commissioner, United
States Employees' Compensation Comm. Second Compensation District.

By: Terence Gargan

Terence Gargan

Notice of Motion for Summary Judgment**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that defendant, Eugene McMullen, Dec'd by George McMullen, Executor, will move this Court pursuant to the direction of Judge Brieant, to be held in U.S. Courthouse, Room 2204 Foley Square, New York, New York, on the 17th day of October 1973, at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard for an order granting a summary judgment pursuant to Rule 56 of the Rules of Civil Procedure of the District Courts of the United States on the ground that there is no genuine issue as to any material fact and that said defendant is entitled to judgment affirming the award of the Deputy Commissioner as a matter of law and for such other and further relief as to the Court may seem just and proper.

In addition, counsel will request a hearing to fix counsel fees, pursuant to Section 926 of the Longshoremen's and Harbor Worker's Compensation Act (33 USC 926) for instituting these proceedings without reasonable ground.

The defendant, John D. McClellan, Jr., will submit on or before October 17th, 1973 a certified copy of the Compensation Order and original Transcript of Proceedings held before the U.S. Department of Labor, Office of Workmen's Compensation Programs, on January 25, 1972 in the

Notice of Motion for Summary Judgment

matter of Eugene McMullen, Claimant-Employee, vs. Overseas African Construction Corporation, Employer, St. Paul Mercury Insurance Company, Carrier, case number DB-F 2-18791, together with exhibits therein, and defendant respectfully refers the Court to these same documents for consideration of this motion. Pursuant to Rule 9 of the General Rules of the U.S. District Court of the Southern and Eastern Districts of New York, you are requested to serve upon the undersigned opposing affidavits and memorandum on or before October 12th, 1973.

Dated: New York, New York
October 4th, 1973.

Yours, etc.

Israel, Adler, Ronca & Gucciardo
by: Angelo C. Gucciardo
A member of the firm
Attorneys for Defendant
Eugene McMullen, Dec'd

To:

Whitney North Seymour, Jr.
U.S. Attorney
Gilbert S. Fleischer
Admiralty & Shipping Section
Department of Justice
Attorney for John McClellan, Jr.,
Deputy Commissioner

To:

Jacowitz & Silverman, P.C.
Attorneys for Plaintiff Overseas
African Construction Corp.

Statement Under Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

**STATEMENT UNDER RULE 9(g) OF THE GENERAL RULES OF THE
SOUTHERN DISTRICT OF NEW YORK IN SUPPORT OF DEFEND-
ANT'S EUGENE McMULLEN, Dec'd, MOTION FOR SUMMARY
JUDGEMENT**

1. That the defendant's Deputy Commissioner's Compensation Order dated June 22, 1972 awarding Workmen's Compensation benefits to defendant Eugene McMullen, Dec'd, is in accordance with law.

2. That the Deputy Commissioner's finding that the claimant, Eugene McMullen was engaged in employment as defined under the Defense Base Act (DBA) 42 USC 1651 (a) is substantiated by the record and should not be disturbed.

3. That the Deputy Commissioner's finding that the claimant, Eugene McMullen, Dec'd, was disabled due to a work related neurodermatitis is supported by the record and such finding should not be disturbed.

4. That the claimant died on January 30, 1972, and pursuant to the Decedent's Estate Law of the State of New York, George McMullen has been appointed Executor for the Estate of Eugene McMullen, Dec'd, Letters Testamentary (*sic*) to George McMullen were issued by Judge Sobel on January 3, 1973, and are still valid and in such capacity he has the power and authority to receive the award mentioned in paragraph #1.

Statement Under Rule 9(g)

5. That the claim has been timely filed within the meaning of the Longshoremen's and Harbor Worker's Compensation Act, 33 USC 901, et seq., and the records substantiates such finding by the Deputy Commissioner and should not be disturbed.

6. That the Plaintiff's request to the Court for an injunction restraining the defendant, Deputy Commissioner John D. McLellan, Jr., from enforcing his Order of Award dated June 22, 1972 is not in accordance with the Longshoremen's and Harbor Worker's Compensation Act, 33 USC 901 et seq., as amended by the Defense Base Act (DBA) 42 USC 1651 (a).

Dated: New York, New York
October 4th, 1973

Yours, etc.

Israel, Adler, Ronca & Gucciardo
By: Angelo C. Gucciardo
A member of the firm
Attorneys for Defendant
Eugene McMullen, dec'd

To:

Whitney North Seymour, Jr.
U. S. Attorney
Gilbert S. Fleischer
Admiralty & Shipping Section
Dept. of Justice
Attorney for John McLellan, Jr.
Deputy Commissioner

To:

Jacowitz & Silverman, P.C.
Attorneys for Plaintiff,
Overseas African Construction Company

Affidavit of Terence Gargan in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

TERENCE GARGAN, being duly sworn, deposes and says:

1. I am an attorney in the Department of Justice, Admiralty & Shipping Section, and appear on behalf of John D. McLellan, Jr., Deputy Commissioner, United States Employees' Compensation Commission, Second Compensation District.

2. This affidavit is made in support of the motion by George McMullen, Executor of the Estate of Eugene McMullen, for summary judgment.

3. On June 22, 1972, the United States Employees' Compensation Commission granted claimant Eugene McMullen a cash award after conducting a proceeding at which factual evidence was presented and at which all of the defenses raised by the carrier were decided adversely to the carrier.

4. The Commission determined that claimant was engaged in employment as defined under the Defense Base Act, 42 U.S.C. 1651(a); that claimed disability was compensable under the act; that a proper party was appointed to recover the award; that the claim was timely filed; and the claimant's employer, Overseas African Construction

Affidavit of Terence Gargan

Corp. placed a proper policy of insurance with the carrier for coverage and for benefits under the Defense Base Act.

5. The carrier St. Paul Mercury Insurance Co., after collecting premiums on the policy, now seeks to avoid its obligation by appealing to this Court on the grounds previously determined adversely to it by the Commission.

6. Furthermore, payment which should have been made within 10 days after being awarded on July 22, 1972, has not been made and plaintiff's estate has been thereby severely prejudiced.

7. The carrier has not conformed to the requirements of Section 21(b) of 33 U.S.C. 921(b) as more fully discussed in the accompanying Memorandum of Law. The award plus 20 percent thereof should be paid forthwith.

8. The moving papers submitted in support of the motion for summary judgment discuss the issues involved in sufficient detail, and therefore a repetition will not be made here.

WHEREFORE, it is respectfully submitted that for the reasons set forth in the moving papers of defendant, Eugene McMullen, the motion for summary judgment be granted together with the 20% additional payment pursuant to the Statute and for other and further relief as the Court may deem just and proper in the premises.

s/

TERENCE GARGAN

(Sworn to October 16, 1973.)

**Affidavit of Irwin B. Silverman in
Opposition to Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of Kings) ss.:

IRWIN B. SILVERMAN, being duly sworn deposes and says:

That he is a member of the firm of Jacowitz & Silverman, P.C., attorneys for the plaintiffs herein and that he is fully familiar with all of the facts and proceedings heretofore had herein.

The attorneys for the defendant, Eugene McMullen, Dec'd has moved under the Rules for Summary Judgment, and contends that the Deputy Commissioner's Compensation Order dated June 22, 1972, is in accordance with the law. We take issue with the defendant's contention and oppose his motion for Summary Judgment, and contend that neither the law or the record support his contention, as to require this Court to deny the motion, or in the alternative to restore the matter for development for proper testimony.

The defendant, Eugene McMullen, Dec'd was employed by the Overseas African Construction Corporation as a chief accountant and office manager of a project consisting of the construction of a settling tank for water and laying a pipe from the tank to the town of Chisimaio, Somalia, Africa during the period from May, 1968 to December, 1968. The defendant, sustained a neuro-dermatitis involving parts of his body as a result of such employment as alleged.

Affidavit of Irwin B. Silverman

The project was supervised by the U.S. Corps of Engineers, who approved the work being done and authorizing payment for it under the terms of the Construction contract. Funds for payment of the completed parts of the project were provided by the Agency for International Development.

There is no dispute as to the fact that the work being performed at Chisimaio, Somalia, was an A.I.D. financed project. But to make a legal determination, as the Deputy Commissioner did, that because it was an A.I.D. Project, it was another name for the Defense Base Act construction contract is untenable.

The Defense Base Act, (42 U.S.C. section 1651) provides Compensation for Disability or Death to Persons Employed at Military, Air, and Naval Bases Outside the United States—There is nothing in the record that Chisimaio, Somalia is any of the above covered areas. In fact, the record will support our contention, that there is no jurisdiction—Page 71 & 72 of the transcript—In response to the Deputy Commissioner's question:

Q. There was no other U.S. Government Military establishment there at the site, to your knowledge?

A. No.

The project at Somalia was totally financed on a development loan basis to the Republic of Somalia, through the Agency for International Development. As evidence of this fact, see attached letter from the Assistant General Counsel for Africa of A.I.D. dated February 22, 1972, which clearly sets forth the fact that the work performed by Overseas African Construction Corporation in Chisimaio was totally financed on a development loan basis.

Affidavit of Irwin B. Silverman

The policy of coverage in question issued by St. Paul Mercury Insurance Company was Voluntary in nature since the project was financed as a Development Loan from A.I.D. The employer herein was not required to provide coverage on this job, under the Defense Base Act, but did so on a voluntary basis and under the terms of the defendant's contract of employment agreeing to provide compensation insurance.

It is further contended that there was no jurisdiction since the defendant did not file his claim timely. It was almost two years after the occurrence when he filed his claim.

The Compensation Order made by the Deputy Commissioner was improper and unsupported by competent medical evidence. No testimony was taken from the defendant's attending physician. His reports were objected to by your deponent. These medical reports leave much to the imagination since Dr. Biro indicates that the claimant had sustained a similar condition in Vietnam in 1966 but was under "fairly good control in 1968 up until the month of May."

The request by the defendant for the award and 20% penalty for non-payment is unsupportable. We maintain that there was no Executor appointed at the time of the Compensation Order dated June 22, 1972, and therefore, the order was defective since there was no legal representative of the Estate.

Further, notice and receipt of the Compensation Order was not served on our office. The Service of process was not complete. In any event, an action was commenced within thirty days of the Compensation Order and therefore a 20% penalty is not in order. *Gulf Stevedore Corporation v. Hollis*, 298 F. Supp. 426 (1969), provides in part:

Affidavit of Irwin B. Silverman

"If any employer or his officers or agents fail to comply with a compensation order making an award, that has become final, any beneficiary of such award or the Deputy Commissioner making the order, may apply for the enforcement of the order * * *"

With respect to the finality of orders section 21(a), 33 U.S.C. section 921(a) provides:

"A compensation order shall become effective when filed in the office of the deputy Commissioner * * * and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

Since this action was instituted within thirty days after the Compensation Order, that order has not become final and the Court has no jurisdiction to enforce it.

WHEREFORE, it is respectfully submitted that for the reasons set forth above and in our Memorandum, there is no substantial evidence in the record to support the Deputy Commissioner's Order, the plaintiffs pray for an order denying the motion for Summary Judgment, and directing that such award and order be vacated and that the compensation claim heretofore filed by Eugene McMullen be dismissed, or in the alternative, that the award and order be rescinded and the matter remitted to take the testimony of the officials of the Agency for International Development as to the nature of the project heretofore discussed, and for such other and further relief as may be just and proper, together with the costs of this proceeding.

Irwin B. Silverman

(Sworn to October 29, 1973.)

Statement Pursuant to Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

*Statement Under Rule 9(g) of the General Rules of
the Southern District of New York in Opposition
to the Defendant's Motion for Summary
Judgment.*

1. The Deputy Commissioner's decision and Compensation Order dated June 22, 1972 awarding the defendant Compensation is not supported by any evidence in the record and not in accordance with the Defense Base Act, 42 U.S.C. section 1651, and therefore, must be reversed as a matter of Law.
2. The policy of coverage in question issued by St. Paul Mercury Insurance Company, was voluntary in nature and not mandatory under the Defense Base Act, but was in pursuant to the terms of the defendants contract of employment.
3. There is no jurisdiction based on the untimely filing of a claim by the defendant, Eugene McMullen, which filing was almost two years after condition was sustained.
4. The Compensation Order made by the Deputy Commissioner was improper and unsupported by competent medical evidence of a causally related disability.

Statement Pursuant to Rule 9(g)

5. The Compensation Order made by the Deputy Commissioner dated June 22, 1972, designated the Estate of Eugene McMullen c/o George McMullen, Executor, was defective since there was no legal representative of the Estate when the Order was filed. Notice of the Compensation Order was not completed as to proper service on the Attorneys for the Carrier, herein. Action was commenced within thirty days of the Compensation Order and a 20% penalty therefore, should not be granted.

Dated: Brooklyn, N.Y.
October 27, 1973

Yours, etc.,

JACOWITZ & SILVERMAN, P.C.
By: Irwin B. Silverman,
Attorneys for Plaintiffs,
Overseas African Const. Corp.

To:

Whitney North Seymour, Jr.
U.S. Attorney

Gilbert S. Fleischer
Admiralty & Shipping Section
Dept. of Justice—Room 4248
Attorney for John McLellan, Jr.
Deputy Commissioner

Israel, Adler, Ronca & Gucciardo
Attorney for Eugene McMullen, dec'd

Memorandum and Order Appealed From
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Brieant, J.

Defendants McMullen and McLellan move for summary judgment, pursuant to Rule 56, F.R.Civ.P., dismissing the complaint here, and granting judgment on McMullen's counterclaim affirming the award of the Deputy Commissioner of the United States Employee's Compensation Commission, for statutory penalty for failure to pay or stay the award, and counsel fees to be awarded against plaintiffs for instituting these proceedings without reasonable ground.

Plaintiff Overseas African Construction Corporation (hereinafter "Employer") is a Delaware corporation engaged in just those activities which its name implies. Plaintiff St. Paul Mercury Insurance Company ("St. Paul") issued to the Employer's assignor, and endorsed for Employer, a certain insurance policy the effect of which is at issue here.

On July 21, 1972, plaintiffs instituted this action, pursuant to §21 of the Longshoremen's and Harbor Worker's Compensation Act (33 U.S.C. §921) and the Defense Base Act (42 U.S.C. §1651, *et seq.*) to enjoin enforcement of a compensation award dated June 22, 1972 made by defendant McLellan in his official capacity ("the award"), setting aside the order and for other relief.

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Subject matter jurisdiction exists under 33 U.S.C. §921 (c) and 28 U.S.C. §1337.

There are no contested factual issues. Our jurisdiction is limited to a review of the proceedings before the Commissioner.

Claimant Eugene McMullen, since deceased, was hired in New York by Employer as Office Manager and Chief Accountant, pursuant to a written contract dated May 14, 1968.

He was assigned to a project at Chisimaio, Somali Republic, Africa, during the period from May 1968 to December 1968. There, his Employer was engaged in a project supervised on a full-time basis, solely by the U. S. Army Corps of Engineers, and financed entirely by the Agency for International Development ("A.I.D.") of the United States Government, which paid out development loan funds directly to the contractor, for the account of the Government of the Somali Republic, as partial performance was certified to it by the Corps of Engineers.

The loan was designated as "Chisimaio Port and Municipal Facilities Loan No. 649-H-002". The Employer was engaged in Phase II of that project. The initial element of scope of work was construction of a settling tank for water drawn from a nearby river, and installation of a pipe-line from the tank, to the town of Chisimaio, and the port. But the single project also included additions to existing port facilities at Serpenti Island, near Chisimaio. The scope of work there comprised a new cargo shed, an overhead conveyor to handle cargo, and placing of a quantity of rip rap as reinforcement of a breakwater. The

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work was difficult; the climate inhospitable. Tension arising out of thefts of equipment and inventory under his charge combined with the long hours and hot humid weather to produce a severe and disabling case of work related neurodermatitis, on his hands, feet and elsewhere. At least, so the Deputy Commissioner found, and there is substantial evidence in the record to justify such finding. He was treated locally, and then hospitalized in Nairobi General Hospital in Kenya on two occasions in August and December 1968.

Ultimately in December, McMullen was repatriated for reasons of health, at a time when his skin rash was so malodorous as to result in his being put off the aircraft at Rome, Italy, while en route to the United States.

His skin condition never fully cleared up; he remained unemployed subsequent to January 1, 1969, until his death on January 30, 1972.

The policy issued by St. Paul provided that:

"Item 3. Coverage A of this policy applies to the workmen's Compensation law and any occupational disease law of each of the following states: VOLUNTARY NEW YORK EXCEPT AS NOTED ON ENDT. #3."

Endorsement No. 3 provides: "It is understood and agreed that Public Law 208 benefits apply as respects the A.I.D. Projects only."

Endorsement No. 5, subparagraph 2) provides: "Policy includes employees working in Chisimaio, Somalia * * *."

Initially, the employee filed claim under the New York State Workmen's Compensation Law. While a reasonable

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construction of the policy should bring the employee also within "Voluntary New York" the New York Commission, after a hearing held June 29, 1970, dismissed the claim for lack of jurisdiction. See §113, New York Workmen's Compensation Law [requiring waiver by claimant, employer and carrier of "their admiralty or interstate commerce rights and remedies"] and *Lewis v. Knappen, Tippetts Abbett Engineering Co.*, 304 N.Y. 464 (1952).

The federal Commissioner relied on Endorsement No. 3. After an evidentiary hearing, the entire record of which has been reviewed by this Court, defendant Commissioner made findings of fact, all of which are supported by substantial evidence.

He found specifically that:

"Chisimaio, Somalia, Africa, * * * is located in the Foreign Compensation District, established pursuant to the provisions of the Defense Base Act (42 USC 1651, et seq.,) which is an extension of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 901, et seq.;) that said employment was pursuant to a contract to be performed outside the Continental United States, as defined in Section 1(a) of the Defense Base Act (DBA) [42 USC 1651(a)] and that the liability of the employer for compensation under said Act was insured by the St. Paul Mercury Insurance Company."

He found that the nature of the employment was such as to come within the Defense Base Act jurisdiction, and was a public works contract involving harbor improvements. He also found:

"there is lack of substantial evidence to overcome the presumption that this claim comes within the provi-

Memorandum and Order Appealed From

sion of the Defense Base Act; that the DBA does apply to this contract and the employment thereunder * * *;

the policy, #C-3989, [of Plaintiff St. Paul] can reasonably be held to apply to the employment of the claimant under the contract described herein and that policy provides the Defense Base Act insurance coverage required of the contractor-employer herein; that the term "A.I.D. Project" in the policy could reasonably be a name for the DBA construction contract described herein, since payments for the work were made through and by A.I.D."

He also found that the disability "arose out of and in the course of the employment", and "constitutes an injury" within the statute.

The Deputy Commissioner made an award in the amount of \$11,250.00, plus \$1,245.50 for medical expenses. This sum, less a lien for counsel fees before the Commissioner in the amount of \$2,500.00, was directed to be paid forthwith to the "Estate" of the deceased employee.

Plaintiffs seek to set aside the award, and concede that the "sole issue in this case is whether the Deputy Commissioner's decision * * * is supported by substantial evidence."

We think it is so supported. Although no physicians testified as to causation, or the etiology of the neurodermatitis, medical reports of a treating physician were properly received in evidence, and were entitled to some weight. The carrier came forward with no expert or other testimony on causation, and its defense before the Commissioner on this aspect may be characterized as half-hearted.

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The only serious issue is whether the policy covered the workmen's compensation benefits in this case. The employee was entitled to compensation both by the statute relied on in the administrative hearing, if this was a project of the sort comprised by the Defense Base Act, and by his contract of employment.¹

The policy specifically refers to coverage for employees working in Chisimaio, Somalia, and Endorsement No. 3 must be read as intending to refer to Public Law 208 benefits (i.e. Defense Base Act) as being available to A.I.D. projects. A reading of the policy and the employment agreement certainly indicates that the parties (Employer and St. Paul) then viewed the Chisimaio project as one which required compensation insurance under the Defense Base Act. While the Employer cannot waive the carrier's rights, its intention, and that of carrier when the policy was issued are of some weight in the matter. The conclusion is inescapable that both regarded the Chisimaio project as within the Defense Base Act.

This conclusion, shared by the Deputy Commissioner, is supported by substantial evidence. The full presence of the United States Army Corps of Engineers, supervising

1. The contract provided:

"Section 7. EMPLOYEE'S INSURANCE BENEFITS

(a) Employer agrees to procure and pay the premiums for such compensation insurance as will accord to Employee (or to his estate or dependents, in the event of his death) the statutory benefits for death or injury to which the Employee may be entitled under the applicable Federal law of the United States including but not limited to the Defense Base Act and War Hazards Compensation Act. Said workmen's compensation insurance shall also include coverage of Employee for illness due to endemic diseases of Somalia * * *."

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the job, and approving all vouchers for interim payment for estimated quantities of rip rap placed in this Somalian Harbor is compelling. The mission of the Corps of Engineers is defense; it is not the Clerk of the Works, or a consulting engineering firm for the private projects of foreign governments, howsoever financed.

Courts must remember the admonition that "We are not to shut our minds as Judges to truths that all others can see and understand" [*McGovern v. City of New York*, 234 N.Y. 377, 392 (1943)]. Certainly we should not reverse administrative determinations for lack of substantial supporting evidence, when the latter recognize an A.I.D. harbor project for what it is, and for what the parties also recognized it to be when the insurance was placed.

We may rely on such factual determinations, even when they relate to jurisdictional facts. See *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 645 (2d Cir. 1965), cert. denied 382 U.S. 835, and cases there cited. In that case, the Court noted "the administrative determination that a case falls within the federal jurisdiction is 'entitled to great weight and will be rejected only in cases of apparent error'." [Quoting *Davis v. Department of Labor*, 317 U.S. 249 (1942).]

A literal reading of the applicable definitions found in 42 U.S.C. §1651(b)(1) excludes the possibility of such apparent error. These include:

"(1) the term 'public work' means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including

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but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project."

Surely the Somalian project was a "harbor improvement" and the water supply "ancillary work in connection therewith." No evidence is cited to the effect that the Somali Republic is our "ally" but we should presume regularity, on the part of the U. S. Corps of Engineers, which probably would not be engaged in supervising a harbor project near the politically sensitive Mid-East area, except as an ally.

We need not reach the issue of estoppel by issuance of the policy, since the Deputy Commissioner did not rely thereon.

As the Employer and carrier had actual notice which was timely, the Deputy Commissioner was justified in his conclusion that the claim should not be barred for late filing.

The fact that the Executor, to whom the award was finally made, was not issued letters of testamentary by the Surrogate of Kings County, New York, until January 3, 1973, almost a year after the award was made to him as such, is of little moment. The doctrine of relation back applies. *McGlothlin v. Pennsylvania R. Co.*, 74 F.Supp. 808 (E.D.Pa. 1947), rev'd on other grounds 170 F.2d 121; *Doyle v. N.Y. Ontario & W. Ry.*, 66 App. Div. 398, 72 N.Y. Supp. 936 (1901); *Rattoon v. Overacker*, 8 Johns. 126

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(1811). As stated by Surrogate Hildreth, *In Re Jadwin's Estate*, 58 Misc.2d 809, 296 N.Y.S.2d 901, 908:

"Courts have held many times that an executor becomes such at the moment of death of a testator, and that letters subsequently issued are merely evidence of the power conferred by the will. The powers of an executor named by a testator derive from the will and not from the letters subsequently issued by the court." (Citations omitted.)

A New York executor has statutory authority to take such reasonable actions after death and prior to probate as is necessary to preserve the estate. New York EPTL §11-1.3. The Commissioner was entitled to assume that the probate would be effected, and that the executor would qualify according to law, as he in fact did. Surely delay in the Surrogate's proceedings should not prevent prompt adjudication in the United States Department of Labor. The Deputy Commissioner was justified in proceeding as he did.

Defendant executor is entitled to judgment on his counterclaim, and the complaint is dismissed for want of merit.

Certain peripheral issues remain. Plaintiffs sought no interlocutory injunction as required by §921(b) of the Longshoremen's and Harbor Workers' Compensation Act. Their complaint prayed for an injunction, but no motion was made, and no hearing sought or held on notice, to demonstrate that irreparable damage would result if no stay were granted.

Payment was not made timely (within 10 days) as required by the Act in the event no stay was sought or re-

Memorandum and Order Appealed From

ceived. The issue is presented whether, under the circumstances, legal fees and costs should be assessed against St. Paul.

Under §14(f) of the Act, a twenty (20%) percent penalty is imposed for such non-payment. While an executor, as here, ordinarily will not have the immediate need for compensation benefits which affects an injured worker in the usual case, the penalty is by its terms mandatory. While a Court might have stayed payment at least pending probate, and the qualification of the personal representative, no such stay was sought, and after January 3, of this year, no conceivable basis existed for such a stay. Defendant executor is entitled to the 20% penalty.

Legal fees stand on a different footing. Although we believe the action lacking in merit, we cannot say that plaintiffs position was frivolous or malicious. Under all the circumstances, each party should bear his own legal fees in this Court.

The Clerk shall enter judgment, pursuant to Rule 58, F.R.Civ.P., in favor of George McMullen as Executor of the Last Will and Testament of Eugene McMullen, deceased, and against St. Paul Mercury Insurance Company, in the amount of \$14,994.60, and costs.

So Ordered.

Dated: New York, New York
November 21, 1973

Charles Brieant, Jr.

CHARLES L. BRIEANT, JR.
U. S. D. J.

Judgment Appealed From

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants having moved the Court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, dismissing the complaint here, and granting judgment on defendant, McMullen's counterclaim affirming the award of the Deputy Commissioner of the United States Employee's Compensation Commission, for statutory penalty for failure to pay or stay the award, and counsel fees to be awarded against plaintiffs for instituting these proceedings without reasonable ground, and the said motion having come on to be heard before the Honorable Charles L. Brieant, Jr., United States District Judge, and the Court thereafter on November 21, 1973, having handed down its memorandum and order directing the Clerk to enter judgment, pursuant to Rule 58, Federal Rules of Civil Procedure, in favor of George McMullen, as Executor of the Last Will and Testament of Eugene McMullen, deceased, and against St. Paul Mercury Insurance Company, in the amount of \$14,994.60., and costs, it is,

ORDERED, ADJUDGED AND DECREED, that defendant, George McMullen, as Executor of the Last Will and Testament of Eugene McMullen, Deceased, have judgment against the

Judgment Appealed From

plaintiff, St. Paul Mercury Insurance Company, in the amount of \$14,994.60., with costs to be taxed.

Dated: New York, N.Y.
November 27, 1973

Raymond F. Burghardt
Clerk

12/14/73—No appearance in opposition. Bill of Costs taxed in favor of the defendants against the plaintiff St. Paul Mercury Insurance Company in the amount of \$20.00 and added to the judgment.

Raymond F. Burghardt
Clerk

Letter re Reconsideration of Additional Fee

[LETTERHEAD OF]

ISRAEL, ADLER, RONCA & GUCCIARDO

ATTORNEYS AT LAW

160 Broadway

New York, N. Y. 10038

November 30, 1973

Hon. Charles L. Brieant, Jr.
U.S. District Court Judge
Foley Square
New York, N.Y. 10007

Re: Overseas African Const. Corp.

-vs-

Eugene McMullen, dec'd.
72 Civ. 3119

Dear Judge Brieant:

I have just received your Memorandum and Order in the above captioned case, granting my motion for summary judgment, dismissing the complaint. Application is hereby made to reconsider the question of payment of my fee.

Of course, the principal issue before the Court was whether there was substantial evidence to sustain the award of the Deputy Commission and primarily most of my brief and motion was directed accordingly. However, collaterally, the issue of unreasonable basis for appeal was raised by defendant McMullen against the plaintiff under Section 926 of the Longshoremen's and Harbor Workers Compensation Act (hereinafter referred to as LHWCA).

In the alternative, as the attorneys for defendant McMullen, I request (in the even relief under Section 926

Letter re Reconsideration of Additional Fee

mentioned above was not granted) that an additional fee for services rendered in connection with this appeal be allowed as required by Section 928 of the LHWCA, prior to amendment of November 26, 1972. In either case we are entitled to a fee and the only question to be decided is whether to assess it against the plaintiff under Section 926 or against the defendant Eugene McMullen under Section 928 of the LHWCA. On this subject I now address myself to the Court.

Defendant's attorneys believe that the Court should assess attorneys' fees against the plaintiff insurance carrier. The LHWCA like all compensation laws throughout the states contemplates the voluntary payment of compensation payments to the claimant upon receipt of notice of disability and injury. The plaintiff's compensation carrier had knowledge of the injury and disability; it was required by the terms of its policy to make payments without the necessity of the legal processes actually held before the New York State Workmen's Compensation Board of the U.S. Department of Labor and the U.S. District Court. Assuming for the purpose of argument that there was no federal or state jurisdiction as incongruously alleged by the plaintiff insurance carrier, it was clearly the intention under the terms of the insurance policy that the provisions of Public Law 208 should apply. Therefore, it follows that the claimant should have been paid voluntarily pursuant to the LHWCA.

Under the law the insurance carrier can only stop compensation payments if it has medical evidence that the claimant was no longer disabled or that he returned to his regular work. Indeed the carrier had neither medical evidence to the contrary (it had the right to have the claimant

Letter re Reconsideration of Additional Fee

examined by its own consultant every two weeks if necessary) or information that the claimant was working. It offers no excuse for failure to make payment voluntarily, as per the very terms of the policy or under any jurisdiction it deemed proper.

Even after the Deputy Commissioner found as a *fact* that there was federal jurisdiction under the Defense Base Act and the LHWCA, it appealed the decision on the basis that there was a question of law involved. This is the only basis that can be used to appeal a compensation order. Questions of fact are not appealable and this is well known to the plaintiff's attorneys who are prominent and knowledgeable in the compensation field. However, a plaintiff cannot allege that there is a question of law involved where none exists.

The compensation law was also designed to discourage appeals being taken where awards in favor of the claimant are made. For this reason *Section 921* of the LHWCA provides that the insurance carrier *must pay the award* even though it appeals. In this case, the plaintiff carrier failed to pay the award, failed to ask for timely relief to stay the payment of compensation, although personally advised by the undersigned that this was a complete violation of the law. The technical excuse given was that no executor had been appointed under New York State Law. However, even after the plaintiff's attorneys were furnish with proof thereof in January, 1973, it never paid that award and *remains unpaid as of this date!*

The entire attitude of the plaintiff's carrier was that they would not pay under any circumstances. And now that it has been shown that its position is legally untenable,

Letter re Reconsideration of Additional Fee

it should be made to pay to the full extent of the law for its unreasonableness. It is not required to be shown that the plaintiff insurance carrier acted in a "frivolous" or even "malicious" manner as recited by the Court in its opinion (next to the last page). It must merely be shown that it was "without unreasonable ground" as per Section 926 of the LHWCA.

On this point, I respectfully refer the Court to the undisputed facts:

1. Eugene McMullen was employed by the plaintiff, Overseas African Const. Corp.
2. Said contract of employment provided for compensation benefits to be paid.
3. The employer obtained a policy of insurance for this purpose with the plaintiff's insurance carrier, specifically covering this work to be done in Chisimaio, Somolia under Public Law 208. (commonly known as the Defense Base Act) and as recited by in the Court decision dated November 21, 1973 "the conclusion is inescapable that both regarded the Chisimaio project as within the Defense Base Act."
4. Defendant Eugene McMullen became disabled within the meaning of the Defense Base Act and the LHWCA. (There is absolutely no medical evidence to the contrary.)
5. That upon the employee's return to the United States he applied to his employer and its insurance carrier for compensation and medical benefits in early 1969.
6. That all compensation benefits were denied by the plaintiff insurance carrier.

Letter re Reconsideration of Additional Fee

7. That claimant attempted to have his rights enforced under the New York State Workmen's Compensation Law; failed; proceeded in the federal compensation laws and was legally successful.
8. Under Section 935 of the LHWCA, the insurance carrier stands in the place of the employer and
 - (1) Notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier,
 - (2) jurisdiction of the employer by a deputy commissioner, the Board or any court under this Act shall be jurisdiction of the carrier and
 - (3) any requirement by a deputy commissioner, the Board or the Secretary or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

Therefore, contrary to the New York principal of law, that the "employer cannot waive the carrier's rights" as stated by the Court in its decision dated November 21, 1973, there is an exception by statute in the instant case under federal law. The employer, Overseas African Construction Corp. admits jurisdiction under the Defense Base Act and *since the insurance carrier stands in its shoes, it too cannot deny jurisdiction.* Again I wish to refer to my argument *supra* that even if we assume there is no federal or state jurisdiction and the plaintiff insurance carrier does not deny the existence of the policy, then why were not voluntary payments made under Public Law 208 (D.B.A.) as required by its terms? The insurance carrier by its stubborn un-

Letter re Reconsideration of Additional Fee

reasonable refusal to pay had caused the claimant untold aggravation and to be dragged through the streets of poverty and degradation and humiliation, and by its actions may have contributed to his death. I do not make the latter statement without good reason. At the conclusion of the hearing held before the Deputy Commission January 25, 1972, wherein the claimant was subjected to prolonged, direct and cross examination, he complained to me of chest pain, stated that he did not think he could make it home on the subway but did not have enough money to take a cab. I loaned him \$10 for this purpose. I was advised at a later date that he was hospitalized and died January 30, 1972 due to a heart condition (within five days from the date of the hearing).

The LHWCA was amended November 26, 1972 and under the new Section 928(a) the carrier is now liable for attorneys fees where a claimant is successful in his claim. It is thus the intention of Congress to hold carrier responsible for attorneys' fees and not to charge the claimant for same.

Based on the unreasonable actions of the insurance carrier and the new Section 928(a) supra, it is requested that the carrier be charged \$6,500.00 for attorneys' fees to be paid separate and apart from all compensation that may be due and payable to the Estate of Eugene McMullen.

Under the old section 928 of the LHWCA, in the event, the Court does not find the insurance carrier in violation of Section 926, then we request additional fees to be allowed in the amount of \$3,000.00. It is estimated that I have expended 25 hours time in preparing this case for trial before

Letter re Reconsideration of Additional Fee

the Deputy Commission and approximately 36 hours additional time in connection with this appeal, including this application. May I state to the Court that I am a specialist in workmen's compensation matters. I personally have over 20 years experience in this field and other members of my firm have had over 40 years experience.

Respectfully submitted,

Israel, Adler, Ronca & Gucciardo

By:

Angelo C. Gucciardo
Member of the firm

cc: Jacowitz & Silverman, P.C.

44 Court Street
Brooklyn, N.Y. 11201

Gilbert S. Fleischer, Esq.
U.S. Attorney
Admiralty & Shipping Section
Dept. of Justice
26 Federal Plaza
Suite 4048
New York, N.Y. 10007

Order re Additional Fee

[SAME TITLE]

Treating the within letter as a motion to reargue the memorandum decision and order of this Court dated November 21, 1973, reargument is granted.

On such reargument, the prior determination of the Court is adhered to, and in addition, the Court fixes the reasonable value of the legal services rendered to the Estate of Eugene McMullen, deceased, in this action at the sum of \$1,800.00, which shall be a lien on the judgment recovered, in addition to the lien previously imposed for services prior to entry of the award before the Deputy Commissioner, and the Court directs the defendant Executor to pay the same out of any funds received by him by reason of the Judgment in this action.

So Ordered.


Dated: New York, New York
December 3, 1973

Charles L. Bricant, Jr.

CHARLES L. BRIEANT, JR.
U. S. D. J.

48a

Construction Contract

(See Opposite )

CONSTRUCTION CONTRACT	Contract No. DACA75-67-C-0044 Date of Contract:
Contractor: REYNOLDS CONSTRUCTION COMPANY 635 MADISON AVENUE NEW YORK, N.Y. 10022	Check Appropriate Box <input type="checkbox"/> Individual <input type="checkbox"/> Partnership <input type="checkbox"/> Joint Venture <input checked="" type="checkbox"/> Corporation incorporated in the State of New York
Owner: The Government of the Somali Republic	
Contract for: (Work to be performed) Chisimaio Port and Municipal Facilities, Phase II	
Place: Chisimaio, Somali Republic	
Estimated Contract Price (Express in words and figures): FIVE MILLION THREE HUNDRED TWENTY EIGHT THOUSAND SIX HUNDRED THIRTY SIX DOLLARS (\$5,329,636)	
<p>1. The Government of the Somali Republic ("Government") and the individual, partnership, Joint Venture, or Corporation named above ("Contractor"), agree to perform this contract in strict accordance with the documents listed below for a contract price arrived at by multiplying the unit prices shown on the Price Schedule by the actual quantities involved:</p> <p>a. Contract Price Schedule consisting of 4 pages</p> <p>b. Specifications 66/9 dated March, 1966 consisting of</p> <ol style="list-style-type: none"> (1) Part I, <u>Statement of Work</u> (2) Part II, <u>General Provisions</u> and the drawings listed in Appendix "A" thereto (3) Part III, <u>Technical Provisions</u> (4) Addendum 1 dated 1 August 1966 (furnished with the original bid package and formally incorporated with Amendment 1 to the Invitation for Bid) (5) Addendum 2 dated 7 September 1966 (Incorporated by Amendment 2 to the Invitation for Bid) (6) Addendum 3 dated 13 October 1966 (the text of which was included as part of Amendment 6 to the Invitation for Bid) 	

c. Invitation for Bid DACA75-67-B-0001 including

- (1) Amendment 1 dated 10 August 1966 (which revised parts of the Invitation for Bid and incorporated Addendum 1 to Specifications 66/9)
- (2) Amendment 2 dated 12 September 1966 (which transmitted Addendum 2 to Specifications 66/9)
- (3) Amendment 3 dated 14 September 1966
- (4) Amendment 4 dated 16 September 1966
- (5) Amendment 5 dated 28 September 1966
- (6) Amendment 6 dated 29 December 1966 (which contained the text of Addendum 3 to Specifications 66/9 and other miscellaneous changes to the Specifications)

2. Work shall be started within 30 calendar days after receipt by Contractor of written notice to proceed, and deposit of a letter of credit providing payment hereunder.

3. Work shall be completed within the number of days listed below after receipt of written notice to proceed:

a. Water intake, treatment plant, and water supply and distribution system - 340 days.

b. Balance of Work - 720 days.

In Witness whereof, the parties hereto have executed this contract as of the date on the first page hereof.

GOVERNMENT OF THE SOMALI REPUBLIC
By: Y. A. Ali, Minister of Defense

CONTRACTOR

Page 1 of 2
(Name of Contractor)

MAA
(Official Title)

By: _____
(Signature)

Date: 31 Aug 1967

Title: _____ Date: 31 Aug 1967

INSTRUCTIONS

1. The full name and business address of the Contractor must be inserted in the space provided on the face of the form. The Contractor shall sign in the space provided above with his usual signature and typewrite or print his name under the signature.

2. An officer of a corporation, a member of a partnership, or an agent signing for the Contractor shall place his signature and title after the word "By" under the name of the Contractor. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney or other evidence of his authority to act on behalf of the Contractor.

ASSIGNMENT

Know all men by these present:

That Reynolds Construction Company of 635 Madison Avenue, New York, New York, USA, (Assignor), a corporation organized and doing business by virtue of the laws of the State of Delaware, in pursuance of a resolution of the Board of Directors of the said Company, passed on the 26th day of May 1967, for good and valid consideration, receipt of above is acknowledge by their attorney in fact does hereby assign on toto its contract with the Government of the Somali Republic for the construction of Chisimale Port Project, Phase II, which contract is dated *January 31, 1967* to Overseas African Construction Corporation (Assignee), a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, USA, and having its principal office at 60 East 42nd Street, New York, New York, USA.

The Assignee in pursuance of a resolution passed on May 26, 1967, by the Board of Directors of the Assignee has hereby by its attorney in fact accept the assignment of the aforementioned contract and does hereby bind itself to fulfill the obligations of this Assignor under the terms of the aforementioned contract for construction of the Chisimale Port Project, Phase II.


ASSIGNMENT (Continued)

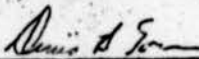
2

This assignment of the aforementioned contract is executed herein at the request and approval of the Government of the Somali Republic as indicated by signature below of Ministry of Public Works.


REYNOLDS CONSTRUCTION CO.
Title: Attorney in Fact
Date: May 31, 1967


OVERSEAS AFRICAN CONST CORP.
Title: Attorney in Fact
Date: May 31, 1967



Minister of Public Works
Government of the Somali Republic
Date:


Contracting Officer
Date: May 31, 1967

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50a

Portions of Insurance Policy

(See Opposite )

Insured by		Contract No.		Contract Date		Contract Description		Contract Address		Contract City		Contract State		Contract Zip	
						161 WEST 10TH STREET		NEW YORK, N.Y.							
Agency No.		Comm. Date		Exp. Date		Tax Code		Code		U.C.F.		Form Key Filled			
Date		No.		Exp.		City		State		Zip		Amount		Contribution	
X X		43		43		X X		X		90					
X X		43		43		X X		X							
X X		43		43		X X		X							

Declarations

Item 1. Name of insured **REINFORCED CONSTRUCTION CO.**

Address **635 EIGHTH AVENUE, NEW YORK, N.Y.**

Individual

Partnership

X Corporation

(Other)

Location - All usual workplaces of the insured at or from which operations covered by this policy are conducted are located at the above address unless otherwise stated herein: **WORKING, AS PER LINE 2**

Item 2. Policy Period: From **NOVEMBER 13, 1966** to **NOVEMBER 13, 1967**
12:01 A.M., standard time at the address of the insured as stated herein.

Item 3. Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states: **WORKING IN NEW YORK EXCEPT AS NOTED ON ENDT. #3**

Item 4. Classification of Operations

Enter in this item, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy

Code No.	Premium Basis	Rate	Estimated Annual Premium
0010	TO BE DETERMINED AT ADJUT	1.50	TO BE DETERMINED AT ADJUT
0742	SUBJECT TO PAYROLL LIMITATION OF \$25,000 PER EMPLOYEE		

Less Constant

Expense Constant

Civilian Office Employees N.O.C.

Other than, Collectors or Messengers Outside

Minimum Premium \$

If indicated below, interim adjustments of premium shall be made:

Quarterly Monthly

Item 5. Limit of Liability for Coverage B - Employers' Liability: \$ 200,000, subject to all the terms of this policy having reference thereto.

Contract Signature Date **NOV 13, 1967**

At **NEW YORK, N.Y.**

Total Estimated Annual Premium \$ **900.00**
Deposit Premium \$ **900.00**

FOREIGN WORKMEN'S COMPENSATION ENDORSEMENT

This endorsement shall not be binding upon the company unless countersigned by an authorized representative nor shall any of its provisions be held to waive, alter, change or extend any of the conditions, limits, provisions, agreements, statements or declarations of the policy other than as above stated.

This endorsement is effective as of February 13, 1966 and forms a part of Policy No. C-5500 of the St. Paul Marine Insurance Company issued to Remedon Construction Co. Endorsement No. 1

Authorized Representative

In consideration of the premium for which this policy is issued, the policy is amended as follows:

SECTION 1. EMPLOYEES COVERED:

- A. It is agreed that the insurance provided by this policy applies only to those employees of the insured who are hired or assigned by him to work at locations within the country or countries stated in Item 1 of the declarations.
- B. This insurance, with respect to any such employee, shall attach from the moment he is hired or assigned for such work and shall cease from the moment his employment or assignment for such work is terminated. If the employee has been hired in the United States of America, coverage continues after termination of employment until his return to the United States of America unless termination of employment is due to his resignation.
- C. This insurance shall not apply to persons other than United States nationals within the country or countries stated in Item 1 of the declarations except as stated herein.

CANADIAN EXCLUDED

SECTION 2.

Coverage A of the policy is deleted in its entirety and the following is substituted therefor:

COVERAGE A—WORKMEN'S COMPENSATION:

- A. The company agrees to pay voluntarily on behalf of the insured, to the employees defined in Section 1 of this endorsement, the compensation, medical and other benefits specified in the Workmen's Compensation Law and Occupational Disease Law of the state designated in Item 2 of the declarations in the same manner as if such employees were covered under the provisions of said law or laws. Voluntary payments shall be made only on condition that the employee or dependents receiving such payments shall execute a full release of all claims against the insured on account of such injuries or disease as may be required by the company and shall in addition execute an assignment to the company of any right of action which they may have against any person, firm, corporation or estate other than this insured who is or may be liable for such injury. If the company collects by virtue of such assignment, an amount in excess of the voluntary payments made or agreed to be made, the company shall be entitled to, and shall retain from the amount recovered, its expenses incident to such recovery and the amount of the voluntary payments made or agreed to be made, and shall pay any

remaining balance of the amount recovered to the party or persons executing such assignments. The company shall have full power and discretion to proceed against the party at fault or to settle with such party upon such terms as may seem desirable to it either without litigation or during pendency thereof.

- B. If a person entitled to payment under Section 2a of this endorsement shall refuse to accept voluntary payments offered hereunder, the company shall be permitted at any time in its discretion to withdraw such proposal to pay compensation benefits with notice to the insured and employee under which circumstances, the company will no longer be bound by the undertakings expressed in this Section.

SECTION 3.

Coverage B of the policy is deleted in its entirety and the following substituted therefor:

COVERAGE B—EMPLOYER'S LIABILITY:

- A. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury caused by accident or disease, including death at any time resulting therefrom, sustained by an employee as defined in Section 1 of this endorsement and arising out of and in the course of his employment in operations connected with his assignment to a country or countries stated in Item 1 of the declarations.

SECTION 4.

The provisions of this policy shall not apply to injury or death due to or arising out of endemic disease.

SECTION 5.

REPATRIATION EXPENSES:

- A. This section applies only if specific coverage hereunder is indicated.
- B. The company agrees to reimburse the insured for such additional expenses as reasonably may be incurred over and above normal transportation costs for repatriation of injured, sick or deceased employees covered by this insurance from the location of operations to the destination in the United States of America, it being understood that such expenses must make such repatriation necessary in the opinion of competent medical authorities.
- C. The liability of the company under this Section 5 shall be limited to the sum of \$5,000 with respect to any one employee.

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ARTICLE 6.

CONDITIONS.

The conditions of the policy are amended as follows:

- A. Condition No. 1 is deleted and the following is substituted therefor:

PREMIUM. The premium bases and rates for the classification of operations covered under this policy are stated in the declarations.

If the premium for the policy is based upon remuneration, the entire gross remuneration estimated to be earned by all employees shall be declared to the company. The remuneration of each executive officer of the insured, if a corporation, shall be assigned without division to the highest rated classification which is applicable to any duty undertaken by such executive officer for any part of the time he is employed.

The premium stated in the declarations is an estimated premium only. The insured shall maintain records of the information necessary for premium computation and shall send copies to the company at the end of the policy period and at such times during the policy period as the company may direct. Upon termination of this policy, the earned premium shall be computed and if it exceeds the premium previously paid, the insured shall pay the excess to the company. If less, the company shall return to the insured the unearned portion paid by the insured.

- B. Condition No. 2 is deleted and the following is substituted therefor:

2. **LONG TERM POLICY.** If this policy is written for a period longer than one year, the premium rates for the first 12 months period shall be those stated in the declarations.

The premium bases, classifications of operations and premium rates for each subsequent period shall be those agreed upon with the company and endorsed upon the policy for such period.

- C. Condition No. 3. **NOTICE OF INJURY.** The following paragraph shall be added:

Notice to the company shall be addressed:
c/o American Foreign Insurance Association
110 William Street
New York 38, New York

- D. Condition No. 8 is deleted and the following is substituted therefor:

8. **STATUTORY PROVISIONS—COVERAGE A.** All of the provisions of the Workmen's Compensation and Occupational Disease Law applicable in accordance with Section 2a of this endorsement shall be and

remain a part of this policy as fully and completely as if written herein, so far as they apply to compensation and other benefits provided by this policy and to special taxes, payments into security or other special funds, and assessments required or levied against compensation insurance carriers under such law.

The insured shall reimburse the company for any payments required of the company under the Workmen's Compensation Law, in excess of the benefits regularly provided by such law, solely because of injury to (1) any employee by reason of the tortious and willful misconduct of the insured, or (2) any employee employed by the insured in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof.

Nothing herein shall relieve the insured of the obligations imposed upon the insured by the other terms of this policy.

- E. Condition No. 15 is deleted and the following is substituted therefor:

15. **CANCELATION.** This policy may be canceled by the insured by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be canceled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than thirty days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing.

If the insured cancels, earned premium shall be computed in accordance with the customary short rate table. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

**SECTION 7.
PAYMENT OF CLAIMS.**

The company at its option may request the insured, on the company's behalf, to make payment direct to any person entitled thereto. Upon receipt of proof of payment, the company will reimburse the insured for such payments.

It is understood and agreed that the policy is amended as follows:

- 1) Additional interest listed on endorsement #4 shall read: OVERSEAS AMERICAN CONSTRUCTION CORP.
- 2) Policy include employees working in Chicago, Sarabia (estimated at 11)

AUG 1 1957

To Be Determined
At Audit

On account of the foregoing, the additional premium is \$....., the return premium is \$.....

This endorsement shall not be binding upon the company, unless countersigned; nor shall anything contained herein be held to waive, alter, change or extend any of the conditions, limits, provisions, agreements, statements or declaration of the policy other than as above stated.

This endorsement is effective as of August 11, 1957 and forms a part of
Policy No. C-3302 of the St. Paul Mercury Insurance Company
issued to Overseas American Construction Co.

Endorsement No. 5

Authorized Representative

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Received in
as exhibit
for the
Date 12/5/77

It is understood and agreed that the name of the insured is amended to include the interest of Overseas African Construction co. (a wholly owned subsidiary).

ccp

NOV 1 1967

D

On account of the foregoing, the additional premium is \$....., the return premium is \$.....

This endorsement shall not be binding upon the company unless countersigned; nor shall anything contained herein be held to waive, alter, change or extend any of the conditions, limits, provisions, agreements, statements or declaration of the policy other than as above stated.

This endorsement is effective as of NOV 16, 1967 and forms a part of Policy No. C 3929 of the GT - FIVE INSURANCE COMPANY issued to OVERSEAS CONSTRUCTION CO.

Endorsement No. 4

Authorized Signature

C

185

PC 11414

- . It is understood and agreed that Public Law 205
benefits apply as respects the A.I.D. Projects only.

On account of the foregoing, the additional premium is \$..... the return premium is \$.....

This endorsement shall not be binding upon the company unless countersigned; nor shall anything contained herein be held to waive, alter, change or extend any of the conditions, limits, provisions, agreements, statements or declaration of the policy other than as above stated.

This endorsement is effective as of December 13, 1966 and forms a part of
Policy No. C-5000 of the St. Paul Mercury Insurance Company
issued to Reynolds Construction Co.

Endorsement No. 3

Authorized Representative

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TERRITORIAL AMENDMENT

It is agreed that all usual workplaces of the insured at or from which operations covered by this policy are conducted are located worldwide, excluding the States of the United States of America, Panama Canal Zone, Puerto Rico, the U.S. Virgin Islands, Canada, Albania, Bulgaria, Czechoslovakia, Communist China, Cuba, East Germany except West Berlin, Hungary, Poland, North Korea, North Vietnam, Outer Mongolia, Rumania, Soviet Union, Tibet and Yugoslavia.

This endorsement shall not be binding upon the company unless countersigned; nor shall anything contained herein be held to waive, alter, change or extend any of the conditions, limits, provisions, agreements, statements or declarations of the policy other than as above stated. D

This endorsement is effective as of December 13, 1956 and forms a part of Policy No. 6-2700 of the St. Paul Mercury Ins. Co. issued to Reynolds Construction Co.
Endorsement No. 2

Authorized Representative

A-204 (MC)
Rev. 9/54

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51a

ORIGINAL



Service of 2 1 copies of the
within Appendix is hereby
admitted this 1 day of
March 1974

Signed _____

Attorney for _____

Service of 2 1 copies of the
within app is hereby
admitted this 25 day of
Feb 1974

Signed Paula

Attorney for Dependants

Service of 2 1 copies of the
within app is hereby
admitted this 25 day of
Feb 1974

Signed Sirley Able

Attorney for Dependants